

UGANDA / JUDGMENT

**Baryamureeba v Kabakonjo & 6
Others (CIVIL SUIT NO. 20 OF 2013)
[2020] UGHCCD 27 (17 January 2020)
[2020] UGHCCD 27**

COURT

HC: Civil Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

CIVIL SUIT NO. 20 OF 2013

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KABALE CIVIL
SUIT NO.20 / 2013**

BARYAMUREEBA JAMES..... PLAINTIFF

VERSUS

| KABAKONJO ABWOOLI | | |

|-----|--|

| RONALD BIRYAHWAHO | | |

| NELSON BINDEEBA | | |

| PETER TWONGYEIRWE..... DEFENDANTS | | |

| GEORGE KANYOMOZI | | |

| PATIENCE TUMUSIIME | | |

| WINSTON RUHAKANA | | |

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO**JUDGMENT****1. Preliminary:**

This suit has been instituted at Kabale High Court where it was filed on 2nd September 2016. In 2017 the Plaintiff made an application before the trial judge for the file to be transferred to Kampala to be placed before another judge citing various grounds including the lawyers and litigants being Kampala based and the Plaintiff not being in good health to continue travelling to Kabale from Kampala.

On 12th October 2017, the matter came up for mention before the trial judge in Kabale ordered for the transfer as per the Plaintiff's request and the placement of the file before the Principal Judge in Kampala, who upon the receipt of the file, reassigned the same to me on 23rd October 2017 for expeditious hearing and completion.

2. Background:

This suit has had a fair amount of trial challenges such as numerous changes to counsels representing the plaintiff and indeed the change of venue. However, through patient handling and the counselling of especially the plaintiff, it has at last come to its conclusion.

As a way of its background, this suit involves family members. The plaintiff is the husband of 1st defendant whom he married customarily sometime back. The 2nd to 7th Defendants are the issues of the marriage between the plaintiff and the 1st defendant. The family place of abode is at Nyakeina village, Nyakagabagaba parish, Rwamucucu County, Rukiga District, formerly part of Kabale District where it has a large chunk of land.

The plaintiff is an old man of advanced age, sickly and retired. He wishes to sell part of the land inherited from his late father and mother and some of which he bought. All these parcels of land amounting to over 20 acres are situated in Nyakeina village, Nyakagabagaba parish, Rwamucucu County, Rukiga District which was formerly part of Kabale District.

In the prime of life, the plaintiff worked as a Cost Accountant and worked in several places including in Kampala at the Kampala Chalk Factory and at Kakira Sugar Works in Jinja.

The plaintiff's family lived a relatively normal and peaceful life in Kabale, Kampala and Jinja. This idyllic family life collapsed in 2005 during which period the plaintiff wanted to sell part of the family land in Kabale to meet his medical and other needs but met opposition to this venture from the defendants.

He subsequently became very unhappy and even ostensibly suspicious as to the real reason as to why he could not sell his land. This state of affairs got exacerbated further by the plaintiff's suspicion that none of his children did resemble himself or any of his relatives making the plaintiff to seek to verify with his relatives both in Kabale and in Toro but apparently was not

successful. This state of affairs made him to conclude that the children he called his were not his marriage and that indeed the 1 st defendant had had extra marital relations with other men resulting in the birth of the children.

This suspicion grew stronger by the day causing a lot of strain and stress within the plaintiff's family resulting in the plaintiff opting to leave his home in Kabale and relocating to Bukoto in Kampala where he currently resides.

While resident in Kampala, the plaintiff contends that in one of the interactions with one of his alleged children, he was drugged, rendered unconscious and subsequently found himself in hospital with a wound in his scrotum which though eventually healed, medical tests did show and confirm that he had been castrated without his consent by his children.

All the above acts together made the plaintiff aggrieved resulting in his disowning the defendants and suing them in court seeking for orders declaring that he has never been the husband of the 1st plaintiff and that the 2 nd to 7 th defendants were not his children. The plaintiff further seeks the issue of orders which will empower him to sell part his inherited and purchased land so that he could meet his day today expenses and including medical expenses.

3. Cause of Action:

The Plaintiff's cause of action against the Defendants jointly and severally is for an award of general and exemplary damages for denial of his right to fully exercise his right of ownership over land located at Nyakeina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale.

The Plaintiff is seeking for orders that:

- a) An order that a DNA test be done in a manner that is economically feasible and yet scientifically reliable by testing the 2nd – 7 th Defendants to prove whether they are children of the Plaintiff.
- b) A declaration that the Plaintiff has a right to dispose of his property.
- c) A declaration to the effect that the Defendants' continued objection to his intention to dispose of the land is untenable in law and unjustified as the 1st Defendant is not his lawful wife and the 2 nd - 7 th Defendants have no legal right to the land
- d) An order allowing him to dispose of his property.
- e) A permanent injunction restraining the Defendants from dealing or disposing off the Plaintiff's property that is to say land located at Nyakeina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale and his cattle.
- f) General damages
- g) Any other reliefs deemed fit by this court.
- h) Costs of the suit.

4. Judicial Process:

a. Procedure:

This matter originated by a plaint which was later amended. Written defenses were filed and also amended. From either side are witness statements on record. Learned counsels represented each of the parties. The plaintiff, however, had a high turnover of advocates due to reason or another till he was ordered by court to self-represent himself till the conclusion of this matter.

At the conclusion of the hearing of the suit, the court visited the locus and gathered useful evidence, the report of which is on record.

b. Plaintiff's case:

The case of the plaintiff is based on the amended plaint filed on 10th January 2018 which discloses the fact that the plaintiff is the owner of various properties including land at Nyakeina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale which he acquired through inheritance and purchases. That around 1970, the plaintiff started a family with the 1st Defendant customarily though no marriage ceremony took place. That during the subsistence of the said relationship the 2nd to 7th Defendants were born.

That in or around 2006, the Plaintiff was led to believe that the 2nd to 7th Defendants were not his children after receiving information that they had been fathered by different other men through extra marital activities of 1st Defendant which fact came to his knowledge around the year 2006 during a function that was organised by the 3rd Defendant (Nelson Bindeeba) wherein the Plaintiff was informed by the 1st Defendant that the 3rd Defendant was not his son but a son to one Steven Tusingwire of Kabale which alleged confession confirmed his earlier suspicions about the paternity of all his children since he himself had even questioned the paternity of the 2nd Defendant, Roland Biryahwaho, who was dark skinned and resembled none his family members, who are all light skinned.

That further around 2007, during the marriage introductory ceremony for Patience Tumusiime's, the 6th Defendant's, the Plaintiff came further to learnt that the 2nd and 5th Defendants were also not his children for even their alleged father who looked like them, was present at the function.

The plaintiff insists that on receiving such devastating information he wanted a DNA test to be conducted against the 2nd to 7th Defendants to confirm their paternity but that the defendants refused to subject themselves to a DNA test leaving the Plaintiff to be left with the belief that indeed none of alleged children of his were his. However, he still seeks court confirmation and orders for carrying out the DNA test to rest the issue.

Further, according to the Plaintiff, the Defendants made it impossible for him to live with them in Kabale and thus have since forced him to leave his home in Kabale and that he is currently residing in Kampala in rented premises.

That furthermore, in 2008, the 2nd Defendant connived with a medical doctor, a one Dan Namuguzi, to have him illegally operated upon him without his consent wherein he was drugged and castrated which fact castration was medically confirmed in 2014 resulting into his developing a hearing problem and joint problem and thus could no longer walk for long distances or in an upright position.

That arising from the disability incurred on him, the plaintiff sought to dispose of part of his land in order to cater for his sustenance and medication but that the Defendants, through their lawyers, on learning his intention, lodged an objection with the local council authorities of the area advising them (LCs) to halt any sale of any piece of land in Kabale on the claim that all the land there was family land not to be disposed without consent of all the defendants.

That even after securing the services of lawyers to inspire the local council authorities to allow the sale of the desired piece of land, the LCs refused to sanction the sale basing themselves on the defendants' earlier rejection.

The Plaintiff thus is aggrieved with the objection of the defendants contending that their objection to the sale his own personal land is untenable in law, unjustified and false for the reasons that:-

- a) The land in issue does not constitute matrimonial property.
- b) The suit land was acquired by the Plaintiff solely and the 1st Defendant is not his lawful wife.
- c) The Defendants do not derive their sustenance on the suit land.

The Plaintiff further avers that as a result of the continued objection by the Defendants to dispose of his property he has been unable to receive medication yet his health continues to deteriorate or that he is unable to get food since he is currently unemployed with his property being the only economic resource could save him from his current financial difficulties.

c. Defendants' Case:

The defendants deny the plaintiff's allegations maintaining that indeed the first defendant is the wife of the plaintiff and that the 2nd to 7th defendants were the children of the plaintiff born to him by the 1st defendant after a customary marriage and was binding on both with the issue of denial of paternity by the plaintiff as regards the 2nd to 7th defendants only arising only when the plaintiff was denied consent to sell family land which they assert was inherited from their grandfather and was thus family land.

The Defendants also asserted that;

- i. They were the ones footing all the plaintiff's expenses in Kampala including rental, food, medication and even his advocates' instruction fees.

- ii. When the plaintiff was operated upon, he was suffering actually suffering from prostate cancer and that his complaint of being castrated was not true with no alleged medical report attached to prove otherwise.
- iii. They were born and have grown up on the suit land and that the 1st Defendant has been in occupation of the land since 1970, thus rendering them even bonafide occupants of that land.
- iv. The plaintiff has to come to Court with dirty hands since they the defendants were indeed the ones currently footing all of the plaintiff's bills ranging from day to day sustenance, food, medical attention and other wise.
- v. They are still committed to footing all of the plaintiff's bills ranging from day to day sustenance, food, medical attention and other wise and there is no justification to sell their land.

5. Agreed Facts:

The agreed facts as per the amended joint scheduling memorandum of the parties filed on 5th July 2018 are that the plaintiff in or about 1970 started cohabiting with the 1st defendant. The plaintiff acquired land at Nyakaina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale through inheritance from his late mother Leah Kyakwa and his father, the late Mwebelihe. That the plaintiff no longer resides with the 1st defendant in Kabale and is currently residing in rented premises in Kampala and is unemployed and retired.

Further agreed facts are that the plaintiff's health is deteriorating and he has developed a hearing and joint problem and could no longer walk for long distances or in an upright position. That the Plaintiff indeed sought to dispose of part of his land which the defendants objected to by lodging an objection with the local council authorities of the area where the land is situated except with their consent for the said is family land and that the local council authorities declined to sanction the sale of the said on the basis of the defendants' protestations.

6. Witnesses:

Each of the parties presented two witnesses. The witnesses for the Plaintiff were James Baryamureba, the plaintiff, who was PW1 and Juliet Kashogy who was PW2.

The defence witnesses were Twongereire Peter, DW1 and Roland Biryahwaho, DW2.

All the witnesses had filed witness statements which are on record and each was subsequently cross-examined at length on those statements.

The court visited the *locus in quo* at the end of the hearing of the suit and got testimonies of various persons whose averments are contained in a Locus Visit report which is also on record.

7. List of documents relied on by the Plaintiff:

- i. Medical record from Friends Poly Clinic dated 18/4/2014.
- ii. Letter dated 7th June 2013 to Chairman LCI Nyakeina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale from Niwagaba & Mwebesa Advocates.
- iii. Letter dated 3rd July 2013 from Kiyemba & Co. Advocates to M/S Niwagaba & Mwebesa Advocates.
- iv. Letter dated 11th July 2013 from Kiyemba & Matovu Advocates to the LC3 Rwamucucu.
- v. Letter dated 16th June 2015 from Kiyemba & Matovu Advocates to the Director Public Prosecutions.

8. List of documents relied on by the defendants:

- i. Letter dated 11th March 2013 to the CID Commandant Kampala Metropolitan.
- ii. Letter dated 3rd September 2012 to the CID Commandant from the Directorate of Public Prosecutions.

9. Court document:

- i. Locus in Quo visit report.

10. Issues:

- 1. Whether the 1st defendant is legally married to the plaintiff?
- 2. Whether the 2nd to 7th defendants are children of the plaintiff?
- 3. Whether the Suit land constitutes family land?
- 4. Whether the plaintiff has a right to dispose of part or the whole of the land?
- 5. Whether the plaintiff is entitled to the reliefs sought?

11. Representation :

The Defendants were represented by Mr. Obed Mwebasa of M/s Niwagaba & Co. Advocates. The Plaintiff was originally represented by Counsel Kwemara Kafuuzi who abandoned him stating to court that there was no issue for the plaintiff in court requiring further legal pursuit.

12. MEDIATION

The court referred the parties for mediation. According to the report of the mediator, Mr. Felix Bakanyebonera dated 11th March 2016, the Plaintiff was very keen to see that mediation was conducted and met the mediator twice. However, Counsel for the Defendants did not file the Defendant's mediation summary notes and failed to contact the mediator. He concluded that the mediation did not take off due to the Defendant's lack of co-operation and returned the file for further action.

13. Hearing of the suit:

The plaintiff did not heed to the advice of his counsel. He sought an adjournment to instruct other lawyers to represent so that the hearing could begin. The Court adjourned the hearing to the 19th February 2019 to enable the Plaintiff seek legal representation. On the next date for hearing the plaintiff informed court although he had secured a lawyer, the said lawyer had withdrawn from representing him due to nonpayment of legal fees. The court considered the matter and ruled that since the plaintiff had been given sufficient time and that his sworn testimony was on record, he was to testify even in the absence of counsel and if need be, on a later date when he got another counsel, he could be given fresh opportunity to have the new counsel lead him on material evidence which possibly be found necessary. The plaintiff, after counselling by court, opted to testify as first witness and so the hearing of his suit began with him. After testifying, the plaintiff sought for an adjournment to get new lawyers but that since he was unable to hire any other lawyer because financial difficulties he should be allowed to instruct those who could represent him free of charge. The court gave the Plaintiff the opportunity to do so including giving him reference to Uganda Law Society Legal Aid Project and the Justice Centers of Uganda organisations which the court believed could give him free legal

representation. The plaintiff was thus given an adjournment of adjournment of two months till the 30th April 2019, which was fixed as the next hearing date.

On that date the Plaintiff informed court that he had since approached Justice Centers of Uganda who had willingly availed him a lawyer but that the allocated counsel needed time to peruse the file first and thus was unable to attend the court on that date. The plaintiff sought a long adjournment to enable his new counsel to peruse the file.

The court graciously granted him an extensively long adjournment of nearly five (5) months to 26th September 2019 when the next hearing date was set. On the next set for hearing the plaintiff told court that his lawyer was still not in court and therefore could not proceed. He sought for a short adjournment which was granted to 11th October 2019. On that date the plaintiff still did not have a lawyer in court and no reasonable excuse was tendered. The Court thus ordered the plaintiff to proceed with the hearing of his second witness given that he had had several opportunities to get legal representation but had failed to do so. Upon completion of the plaintiffs' testimony, the defendants called their two witnesses whom he vigorously cross examined.

Thereafter the court set the matter for locus in quo visit before delivery of judgment.

14. What the dispute before this court entails:

The agreed and or undisputed facts relating to this matter are that in or about 1970, the plaintiff started cohabiting with the 1st defendant and that the plaintiff acquired land at Nyakaina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale through inheritance from his late mother Leah Kyakwa and his father late Mwebelihe.

Other agreed facts are that the plaintiff is no longer residing with the 1st defendant in Kabale and is currently residing in a rented premises in Kampala, is unemployed and retired. Also agreed by both parties are the facts that the plaintiff's health is deteriorating, that is to say he has developed hearing problems, joint problem and can no longer walk for long distances or upright.

Also the facts agreed by both parties is that the plaintiff sought to dispose of part of his land which the defendants objected by lodging an objection with the local council authorities of the area where the land is situated claiming that the land cannot be disposed off except with their consent since it is family land.

Lastly the parties agree that the local council authorities where the land is situated did indeed refuse to sanction the sale of land by the plaintiff on the basis of the defendants' objections.

Seeing that the above positions are agreed by both parties, this court will not examine further except mention them in passing where need be.

What this court will examine further and make decisions on are the disputed facts of;

- a. Whether the 1st Defendant is legally married to the Plaintiff.
- b. Confirmation as to the paternity of 2nd to 7th defendants as deriving their fatherhood from the plaintiff are children of the Plaintiff.
- c. The disputed fact of whether a medical operation was carried upon the plaintiff against his will and which resulted into his being castrated or not and ;
- d. The fact of whether the plaintiff is mentally sound or not.

15. Decision of Court:

a. Whether the 1st Defendant is legally married to the Plaintiff:

In his amended pleading amended pleadings filed in court on the 10th of January, 2018, paragraph 5 (b) confirms his relationship with the 1st defendant.

Paragraph 5 (b) of the plaintiffs pleadings states and I quote;

"... The plaintiff in or about 1970 started cohabiting with the 1st defendant but no marriage was celebrated. During the said relationship the 2nd - 7 th defendants were born..."

This position is reiterated by the plaintiff in his oral testimony given in court on the 14th January 2019 confirming a relationship with the 1st Defendant which started in October 1970 and apparently lasted up to or until 2005 which resulted in the birth of the 2nd - 7 th defendants.

The fact of this relationship and the resulting issues of the relationship is not disputed by any of the parties in this dispute. What is vehemently disputed by the plaintiff is that the 1st Defendant was not his legally wedded wife but merely a girlfriend who resided with him all those years at his ancestral place and bore him seven children which he allegedly sired beginning 1970 until after 2005.

The 1st defendant and the rest of the defendants think otherwise insisting that the plaintiff customarily got married to the plaintiff and bore him the seven disputed children whom he even looked after from childhood to adulthood at the disputed place of abode at Nyakeina village wherein is found inherited and purchased pieces of land.

To support his insistence that the 1st defendant was not legally married to him, the plaintiff cites the fact the Bakiga cultural norms which requires the payment of dowry before one marries or after a woman stays and that since he did not undergo the process which he referred as *'Okwechangera'* then the 1st defendant could not be stated to have been legally stated to be his wife but remains a girlfriend.

Narrating further the background of how he came to be with the 1st defendant, the plaintiff informed court that upon the 1st defendant getting pregnant with the first born, , her late brother called Nyakabwa Vincent and her father called Gereshom Kwebiiha wanted them to get married in church but that he chose to go to the Office of the District Commissioner with the 1st Defendant so as to legalize their intended staying together but that after the requisite 21 days' notice both couple went to Namirembe Cathedral to register for a Christian marriage but the church authorities was asked them to register and to announce the intended marriage afresh, which advise he , the plaintiff refused to follow opting instead to pay dowry first and then subsequently returning to Namirembe.

The plaintiff informed court further that upon his refusal to do as directed by the church authorities, the 1st defendant's father and brothers took her away from him to their home but that later sent the 1st defendant to his home then at Ntinda where she continued staying with him from 1970 to 2005 and they have never separated with the 1st defendant subsequently giving birth to all the seven children at the same place and in Kabale.

Further the plaintiff informed court that during that entire period from 1970 he looked after the 1st defendant and her children by meeting all their expenses like accommodation, feeding, clothing and school fees even though he ever paid any bride price for the 1 st defendant as per his tribal customs or legally wedded in church as was previously planned.

On the other hand, Kabakonjo Alice Abwooli, the 1 st defendant, who however, did not give any oral testimony in court in her sworn affidavits of 1 st July 2016 and that of 2 nd August 2018, paragraphs 2 and 6, respectively, avers that she started living with the Plaintiff in 1969 and thereafter contracted a customary marriage with him in 1973 and begot together with the plaintiff eight (8) children; six boys and two girls. She, however, does not inform court as to how the customary marriage was celebrated or performed. Indeed the court did not receive any testimony from any quarter regarding the celebration of marriage either customarily or legally but received overwhelming testimonies including those from eye witnesses at the *locus in quo* which pointed to the fact of the plaintiff and the defendant staying as husband and wife at Nyakeina and diverse other places from 1970 till about 2005 and were blessed with children as a result of their staying together.

For a marriage in Uganda to be legal and recognised, it may be contracted under any of the following laws;

- The Marriage Act, Cap 251 of the Laws of Uganda
- The Customary Marriages (Registration) Act, Cap 248 of the Laws of Uganda
- The Marriage and Divorce of Mohammedans Act , Cap 252 of the Laws of Uganda ,
- The Hindu Marriage and Divorce Act , Cap 250 of the Laws of Uganda, and
- The Marriage of African Act, Cap 253 of the Laws of Uganda

The testimonies of both the plaintiff and the defendant, though not agreeing seems apparently to refer a marriage celebration which is either under the Marriage of African Act, Cap 253 of the Laws of Uganda or the Customary Marriages (Registration) Act, Cap 248 of the Laws of Uganda.

For avoidance of doubt I quote their relevant sections below:

Under the Marriage of African Act, Cap 253 sections 2 applies the provisions of the Marriage Act Cap 251 mutatis mutandis but provides for the formalities to be followed , by whom such a marriage can be done before and where such a marriage may take place.

On the other hand under the Customary Marriages (Registration) Act, Cap 248, a marriage contracted customarily may be polygamous and must be registered in a "**Customary Register Book**" which the law requires every district to keep. (See Sections 2, 4 and 6 of the Customary Marriages (Registration) Act.

Section 1 of the Customary Marriages (Registration) Act, Cap 248 is the definition section and defines customary marriage as

"...a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part ii of the Act..."

The testimonies on record and those of both the plaintiff and the first defendant do not pinpoint to any celebrations according to the rites of either the Bakiga community which the plaintiff belongs to or to that of the Batoro to which the 1st defendant belongs to or to the existence of a certificate of a customary marriage as required under Section 6 of the Customary Marriages (Registration) Act which states thus;

Section 6(1) provides:

"... The parties to a customary marriage SHALL (emphasis mine), as soon as may be, but in any event not later than six months after the completion of the ceremonies of marriage, attend to the office of the registrar of

marriage district in which the customary marriage took place, with at least two witnesses to the marriage ceremonies, to register the details of the marriage..."

In addition to the above requirement of the law ;

Section 6(1) provides:

"...The parties shall register the marriage as 'a customary marriage'..."

Relating the above provisions to the evidence adduced before this court, while there is the oral testimony by the plaintiff mentioning of the fact that he together with the 1st defendant went to the registrar of customary marriages upon the 1st defendant getting pregnant the first time, no certificate registration of the customary marriage or evidence of a ceremony of any such marriage was adduced or proven before this court to show that indeed a customary marriage took place and was indeed registered as is required by section 6 (2) and neither was a register of such marriage adduced in court as required by section 6 (3) of the same law produced in court to prove the fact that a customary marriage was registered , fees paid and that the plaintiff and the 1st defendant together with two witnesses signed such a register.

All what is on record is that either an attempt was made to have the ceremonies take place or that the two parties stayed together. What is inherently lacking is concrete evidence inform of a certificate of any such marriage or witnesses to the fact that indeed a ceremony in accordance with the rites of any of the African community was conducted which even the law allows upon payment of a prescribed fee the registration and issuance of a certificate to that effect even out of time. **See: 6 (7) of the Customary Marriages (Registration) Act .**

Given the above concrete evidence to prove any existence a of marriage as required and even defined either under Marriage Act Cap 251 or the Customary Marriages

(Registration) Act this court is unable to determine the existence of any valid marriage between the plaintiff and the 1st defendant as provided for by the various laws. I do so find.

e. Whether the 2nd to 7th defendants are children of the Plaintiff:

The Plaintiff vehemently denied paternity of the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants although in his sworn testimony he testifies to the fact that indeed he had a relationship with the 1st Defendant whom he started staying with in October 1970 up to about 2005 and who later bore to him several children including the 1st born, Jacqueline Mpereirwe in 1971 and another child Ivan Biryareema. According to the plaintiff in August 1973, they had a third born called Ronald Biryahwaho, though who while growing had no visible resemblance to any member of his family or that of the 1st Defendant.

Furthermore, the plaintiff testified that more children were born and all were provided for by him including their schooling needs at primary, secondary and university (for all the children and in the case of Roland Biryahwaho at the university) and that he even contributed cows for the payment of their dowry (for Nelson Bindeeba believing that all these children were his. The children namely Peter Twongeirwe (4th Defendant) in 1976, George Kanyomozi (5th Defendant) around 1978 with other children called Patience Tumusiime (6th Defendant) and Winston Ruhakana (7th Defendant) following suit in 1979 yet to his surprise he later found out that all these children had different fathers for example he mentioned that he attended the customary wedding of Patience Tumusiime he noticed that one Mr. Mirembe resembled George Kanyomozi while one Simon Rwemisisiru resembled Peter Twongyeirwe.

The plaintiff went on to state further that he even came to confirm that the father of Nelson Bindeeba (3rd Defendant) was Steven Tusingwire while that of Peter Twongweire (4th Defendant) was Simon Rwemisisiru, that of George Kanyomozi (5th Defendant) was called a one Mugenyi while that of Patience Tumusiime (6th Defendant) was Alphonse Mbyemeire although another man called Keizia s/o Rutaraweire claimed her. Lastly he testified that the father of Winston Ruhakana was one Berenaidos Kamukuba insisting that his only children with the 1st defendant were Jacqueline Mpirirwe and Ivan Biryareema who passed away.

This denial of paternity formed part of his oral testimony and also his witness statement dated 5th July 2018.

This position of his was confirmed by his very own witness Juliet Kashogy (PW2), his sister, in her witness statement dated 5th July 2018 wherein she states that it was the Plaintiff who told her that the 2nd - 7th Defendants are not his children having been told by the 1st Defendant. This witness came to court and contradicted her filed written testimony for while on oath in court she testified that she believed strongly that the Plaintiff fathered all of the 2nd to 7th Defendants.

On the other hand all the defendants in their either written sworn statements or oral testimonies in court confirmed that 2nd defendant to 7th defendant were all biological children of the plaintiff and 1st defendant.

In his pleadings the plaintiff sought for and his request was granted in that the court sought professional opinion in regards to the paternity of the 2nd to 7th defendant.

In a report on the parentage made by the Directorate of the Government Analytical Laboratory to court dated 13th August 2018, one Jane Nabwowe a Government Analyst wrote to court indicating that after carrying out a DNA test and analysis on blood samples supplied by the parties to this suit, she was able to come to the

conclusion that Plaintiff was the biological father of Twongyeire Peter, Tumusiime Patience, Bindeeba Nelson, Ruhakana Winston, Biryahwaho Roland and Kanyomozi George for according to the guiding principles of inheritance , a child inherits half of his or DNA from a biological father which fact tests using DNA technology confirmed in the case of the plaintiff and the 2nd to 7th defendants upon examining and comparing the DNA profiles of the biological parents with those of the children thus it was possible to determine the biological parents accordingly.

The plaintiff contested these findings at a hearing on 14th November 2018, and he insisted that he has previous evidence from another DNA report which found that the 2nd -7 th Defendants were not his children. He told court that he would avail that piece of evidence but did not do so over the course of proceedings.

In trying to water down the independent DNA test , the plaintiff casually testified on the 16th January 2018 to the fact that he did not believe in the finding that he was the father of the 2nd to 7th defendants for he believed that the DNA results were doctored and was merely just bought arguing that since the report took sometime before it was released, then the results must have been tampered with to reflect paternity in favour of the Defendants although he did not avail any evidence to support these claims.

The Plaintiff's failure to produce evidence contrary to the findings of the report of 13 th August 2018, in my view tempered with the fact that most of his testimonies were not supported by concrete evidence other than mere doubt, misgivings and suspicions compared with the testimony this court received not only from him showing that up to around 2005 to 2006 the plaintiff had no cause to doubt the paternity of his children but was only suspicious of resemblances which were not based on any scientific analysis but mere conjectures and assumptions which came to its head upon his being stopped from selling land in the face of a scientific report which was well presented makes this court to conclude that without any other evidence being adduced to contradict the government analyst DNA results findings then in my view that DNA report on record is irrefutable for it was carried out upon the request of the plaintiff and all the parties to this suit underwent tests the result of which the DNA report was made and submitted to this court.

The DNA report, when put in light of the admission of the plaintiff that indeed he had a relationship with the 1st defendant from 1970 till around 2005 or 2006, a period of over 25 years when the relationship apparently soared, is found persuasive and without any other contrary evidence conclusive to prove paternity, given that the plaintiff himself admits the fact of having a long standing relationship with the 1st defendant which spanned over 25 years during which a

number of children were born which the DNA report itself scientifically points to the plaintiff as being the person primarily responsible for their birth.

Further when the court visited the locus in quo all evidence as summarised in the report conclusively pointed to the plaintiff as having been in a relationship with the 1st defendant with even the local authorities therein averring that indeed the parties before them were known to them and were all previously resident in the said village for over twenty years at the residence of the plaintiff which was left by his mother and father.

I am thus inclined to believe these findings as opposed to mere allegations made by the Plaintiff who in my view was unable to prove on a balance of probability that he was not the father of the 2nd to 7th defendants. *(See also Margaret Tumwine Tumushabe and Others vs Brian Asimwe Consolidated Miscellaneous Applications 125 & 132/2014 arising from CS No. 15/2013; In Re Nassozi)*

Immaculate (Child) Miscellaneous Application No. 208/2014 [2015] UGHCFD 1(12 January 2015))

f. Whether the suit land constitutes family land:

The central issue for resolution in this case, is whether the suit land constitutes family land.

According to Section 38 A (4) of The Land Act Cap – laws of Uganda defines family land as;

Section 38 A (4) of the Land Act:

".... Family land" means land—

(a) On which is situated the ordinary residence of a family;

(b) On which is situated the ordinary residence of the family and from which the family derives sustenance;

(c) Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;"

In his sworn testimony, PW1 James Baryamureeba testified that he inherited most of the land owned in Kabale. This fact is agreed by the defendants although he adduced no evidence in form of a title or any inheritance document. However, since this fact is undisputed I will not dwell on it.

On the other hand the plaintiff states that additional land which formed part of the land in question was his and bought by his mother in the 1950s. He also adds that the 1 st Defendant cultivated the said land over a period of time deriving sustenance from the land by growing crops. He, however, denies the contention of the defendants that additional land was purchased using the money that was paid as compensation of Ivan Baryareema's death following his accidental demise.

Observing for his witness statement dated 3rd July 2018, the plaintiff avers that he owns various properties including;

- Two pieces of land measuring 70-80 acres that he inherited from his father, the late Mwebeihe who passed away in 1942 since he was the only boy child. This includes the 1st piece of land that borders Kirundwe Catholic Church and Kirundwe Primary School in the West, in the North it borders the late Kakiga's son, the late Rushogoli's son , Busingo and Mishango's son in the North, the late Bafanako and Kabigumira in the East and a path in the South; and the second piece of land borders Tabaro, the late Katoryo and the Rwamisisiro in the East, Zikamukuba and the land adjacent to the land he purchased from A Myemeire and E. Kaburahora in the South and Kirundwe Catholic Church in the West.
- Land that he inherited from his late mother, the late Leah Kyakwera, which borders a path to Kamutungu in the East, Zakamukuba and the late Tumeineho in the North, a road to Kamutungu in the South. According to the Plaintiff, this is where he built his home and where the Defendants are also living.
- Land that he solely purchased from Alifunsi Mbyemeirwe and Ezra Karuhoona at Nyakeina, Nyakagabagaba, Rwamucucu, Rukiga, Kabale, which borders a small water stream in the East, across the stream is Zikamukuba, a road to Kirundwe Catholic Church and Kirundwe Primary School in the South, in the west Kamushenshera's son and in the North adjacent to the land I inherited. He stated that the agreements and all other documents in regard to the land are in possession of the 1 st Defendant.
- Land which formerly belonged to the late Kikyezi which was sold to him by a man from Kabira. According to the Plaintiff, this land borders Kamushenshera in the North, a footpath to the well in the East, Beedwa in the West, and Julian the late Kikyezi's daughter in the South. He said that he could only remember the vendor of this and once he looked at the documents but that these are in the possession of the 1st Defendant. According to the Plaintiff, none of the Defendants contributed financially to the purchase of the land.

This description was also included in the witness statement of Juliet Kashogye dated 3 rd July 2018 who is his sister and testified as PW2 who in her sworn testimony, told court that the land is in three different locations with the entire land belonging to their father and mother and that she has a share on the land and was willing to allow the Plaintiff to sell the land so long as she gets a share of the proceeds of sale Peter Twongeirwe, who testified as DW1 informed court that the suit land is about twenty (20) acres. He said that the land is used for family farming and is still as intact as it was left by their grandparents. He told the court that his grandmother is buried within

the homestead while his grandfather was buried on the part of the land which was taken over by the government. According to him, the Plaintiff stays at Bukoto where they pay for hi rent, medical care, food and upkeep, and as such there is reason to sell the land.

During cross-examination, DW1, stated that in between the pieces of land, another piece of land was bought from the compensation awarded for the death of their late brother who died in an accident. He explained that initially there was a gap separating the pieces of land owned by the family. This land was owned by Kaberona, Kabakura Bernard, Byemire and Tumwesigye Livingstone. When they got compensation for Biryabareema's death, they bought off this land so that the entire land is now joined together. He said this land has the family cattle on it.

In his witness statement DW2 Roland Biryahwaho states that the suit land is family land and has always been used for farming, he added that the 1st Defendant who is of advanced age and is sickly also derives her livelihood from the land. According to him, the family derives their livelihood from the suit land. He added that while the Plaintiff intends to sell the land to take care of himself, all the Defendants are against the sale because they are taking care of his needs including rent for a house in Bukoto, feeding, medical expenses as well as upkeep. According to DW2, another piece of land was bought using compensation awarded for the death of their brother, Ivan Biryareema and this was added to the main land. He testified that this land was bought from Ezra, Mbyemire, Livingstone and Kamukuba.

He told the Court that his mother, DW1 derives her sustenance from the suit land, and the family also rears cattle there. No other persons reside on the land which also contains the family burial grounds. He asked the Court not to allow the land to be sold as this is where the Plaintiff will also reside when he retires. He denied the Plaintiff's claim that the Defendants made it impossible for him to stay in Kabale and made him a prisoner in Bukoto.

The evidence on record indicates that the family land in this case includes not only the homestead (the Plaintiff states that this land was inherited from his mother) but also has a farm, and other plantations. As such, for all intents and purposes the Plaintiff, the 1st Defendant ordinarily reside on this land. During the *locus in quo* visit, the Court also saw that there are two houses which are occupied by the Plaintiff's family. The Defendants informed the Court that another house was recently constructed for the Plaintiff to live in. The Plaintiffs and the Defendants also testified that DW1 began cultivating on the land that was inherited from the Plaintiff's father in 1978.

The court also took interest in visiting the locus in quo to allow itself and enable parties supplement or substantiate what had been said in court. At the locus in quo, the court received additional testimonies from the Plaintiff, some of the defendants, the L. C I and LC II Chairpersons and some of the neighbours to the disputed land. The court took the opportunity to walk the whole length and breadth of the disputed land.

The Court noted that the contested land inherited by the plaintiff contains a farm of over 20 acres, two houses and the graves of the plaintiff's mother and eldest son. The land is currently occupied by the 1st defendant who is also the plaintiff's wife and the other defendants. One of the

two houses on the land belongs to the plaintiff while the other house is occupied by the defendants and the rest of the family. As such, the court notes that the Plaintiff's averments that the land measures eighty (80) acres is not necessarily true for the land observed was less in acreage.

As confirmed by the **locus in quo** and from the court record, it is evident that the suit land fits within the definition of family land, as it is land from which the Defendants, and indeed even the Plaintiff, directly or indirectly derive sustenance. The 1st Defendant cultivates on the land for her sustenance and livelihood.

The evidence on record fully places the suit land under the provisions of section 38 A of the Land Act. See also **Tumwebaze vs Mpeirwe & Another HCT-05-CV-CA-039/2010 [2013] UGHCLD 9 (8 February 2013*)*.

This court accordingly finds that the suit land falls within the definition of family land under the Land (Amendment) Act 2004. As such it cannot be the subject of a sale without the consent of the other party.

Section 38 A (1), (2), (3) of the Land (Amendment) Act provides for security of occupancy on family land. The broader import of this section is to give security to spouses. In the instant case, although the court has not found sufficient proof of marriage, this entire section must be interpreted broadly to include even those that are not married as per the laws governing marriages as in Uganda.

The intention of the legislature was to avoid situations where one party to such unions would try to deprive another of their rights to property through claims that they are not legally married. As such in this situation before me, the court will avoid a strict interpretation of the section, or of the definition of the term 'spouse' to prevent absurdities. The Plaintiff and the 1st Defendant lived together for over 35 years, bore children and derived sustenance from the land. I find that the Plaintiff and the Defendant were constructively married and thus fit within the meaning of section 38 A.

In her evidence, the 1st Defendant mentioned that on several occasions, when the Plaintiff was out of work, she would till the land to pay school fees for the children and provide a livelihood for the family.

I would thus make finding that the land is question is for the use of all the parties before me and thus consent is required before it can be sold.

16. Orders:

From the above findings this court makes the following orders;

- That indeed the plaintiff and the defendant had no legally binding marriage,

- That since there has been proven that 2nd to 7th Defendant are children of the plaintiff and 1st defendant then the prayers for declarations that the Plaintiff has a right to dispose of his property is not granted as the land in question falls within the meaning of family land as defined by the Land Act,
- This court declines to give a declaration to the effect that the Defendants' continued objection to his intention to dispose of the land is untenable in law and unjustified as the 1st Defendant is not his lawful wife and the 2nd - 7 th Defendants have no legal right to the land.
- The court also declines to grant the order for disposal of the property and the rest of the orders sought by the Plaintiff.
- This court noting that the plaintiff is of advance age and require support does issue orders that the 2nd to 7th defendants together and jointly must ensure proper care, sustenance, medical, accommodation, transport and all necessary living expenses of the plaintiff including paying him a stipend of Shs 700,000 per month for his own exclusive use on top their meeting all his other expenses.
- Each will meet its own costs.

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HON. DR. JUSTICE HENRY PETER ADONYO

JUDGE

17th January 2020

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